SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the District Court (R. 88-89) is unreported. The opinion of the Court of Appeals (R. 97-103) is reported in 131 F. (2d) 23. The statutes involved are set out as the Appendix to this brief. The jurisdiction of this Court, the statement of the case, and all other preliminary matters have been set forth in the foregoing petition.

Summary of Argument.

POINT I.

The lower courts erred in their interpretation and construction of Sections 23h and 23i of Title 22 of the United States Code.

POINT II.

The lack of confirmation by the Secretary of State of petitioner's rating as "unsatisfactory" rendered such rating null and void.

POINT III.

The rule of the Court of Appeals that the existence of actual malice in a public officer is immaterial and does not subject such officer to any judicial review is contrary to the established law of this Court and is without precedent anywhere.

ARGUMENT.

POINT I.

The lower courts erred in their interpretation and construction of Sections 23h and 23i of Title 22 of the United States Code.

Sections 23h and 23i are set out in full in the Appendix to this brief. Petitioner claims that he has been denied his rights under both sections as fully alleged in the complaint.

Section 23h. Petitioner says that under 23h he was entitled to be presented with charges and have an opportunity to reply thereto before being placed on probation. Thus the statutory words "no charges" mean "no thing", since as Webster defines the word "charge" it is "the laying of a thing to the account of another; imputation; accusation" and the example given by Webster is a quotation from Whewell, "the *charge* of confounding together very definite classes of phenomena". The word "reply" means, according to Webster, "to answer" and "in writing", while the example given is from Shakespeare, "Give me *hearing* what I shall *reply*".

No pretense is made by respondents that any opportunity to reply to charges was ever given petitioner, either on the two false stories or on "temperamental unfitness" and allied charges. Instead respondents say 23h is a bifurcated section providing for a rating of "unsatisfactory" by either "charges" (not used here) or by "review of the record", which was used here. We say this is contrary to the purport of the statute and the intent of Congress as discussed below. Respondents' argument of bifurcation has no support in the statute or its history, but is an ingenious idea of counsel fitted to the *fait accompli* of Berle and Shaw. Respondents assert a completely arbitrary interpretation of Section 23h, one which the very statutes they attempt to interpret are aimed against. Congress specifically legislated against such dual or bifurcated procedure. The methods of dismissing an officer from the Foreign Service do not and were not intended to vary with the offense charged against him, whether general or specific. As is apparent from the statutory history, the intention of Congress was to enact a *double protection* for Foreign Service officers selected by examination, then appointed by the President and confirmed by the Senate, (1) the Civil Service protection accorded in similar cases in *all types of cases* under Section 23h, making no distinction between a review of the record as against the preferment of specific charges but rather intending that nothing should be taken into consideration in reviewing the record that was not referred to the officer concerned for reply, and (2) the full and formal hearing before the Secretary of State personally, required by Section 23i. See Senate Report No. 1069 of the 70th Congress, First Session, and House Report No. 2702 (1931).[5] It was the intention of Congress, in other words, to vest in lifetime career officers of the

[5] Other hearing references are contained in Note 14 to the opinion of the Court of Appeals (R. 101).

Foreign Service a right to their position similar to that of every army and naval officer in the enjoyment of their positions in the armed services without regard to changing political conditions, and it is this right which petitioner claims is violated in his case. The contrary interpretation asserted by respondents is arbitrary and dictatorial, contradictory of the intent of Congress, and in this instance an *ad hominem* contrivance on the part of Berle and Shaw. See the complaint, *passim* (R. 1-71). Respondents and petitioner alike are creatures of Congress, and it is incumbent upon them all to respect the will of Congress as manifested in its statutes, reports, and hearings. (*Cf. United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 181.)

The consistent denial by respondents of petitioner's right to counsel in every step of their proceedings is sufficient to vitiate these proceedings in their entirety. The right to counsel is fundamental. See *Powell* v. *Alabama*, 287 U. S. 45, 67 *et seq.*; *White* v. *Texas*, 310 U. S. 530; and following cases in this Court. At this point of the argument the pertinent proposition is, however, that the phrase "except after the officer shall have had opportunity to reply thereto" (to "charges") (Section 23h) requires an opportunity to be represented and heard by counsel as often demanded by petitioner and invariably refused by respondents. Thus in *People ex rel. Mayor* v. *Nichols*, 79 N. Y. 582, under a statute which authorized the Mayor of New York City to remove the Police Commissioner "for cause and after opportunity to be heard" the proceeding was held to be a judicial one, with right to counsel, and hence reviewable by certiorari. Likewise in *People ex rel. Ellett* v. *Flood*, 64 N. Y. App. Div. 209, 71 N. Y. Supp. 1067, a statute providing that firemen held office during good behavior or until the Board of Fire Commissioners should decide that they were incompetent or inefficient and for such reason order their

removal also required the Board of Commissioners to permit firemen "to defend by counsel" and solely for violation of that right a fireman's removal was held void. See also *Morgan* v. *United States,* 298 U. S. 468, 480. The right to counsel in all administrative proceedings is assumed to be inherent by the Attorney General's Committee and respondent Acheson. See "Final Report of the Attorney General's Committee on Administrative Procedure", *passim.* Further excerpts of interest in the instant case from this Report are to be found at pages 62, 63, 64-65, 67, 68, 72, 76, 77-78, 78, 78-79, 80-81, 88 thereof.

Section 23i. It is undeniable that Section 23i in terms requires (1) confirmation by the Secretary of State of probationary status (dealt with in Point II of this brief), and (2) a hearing by the Secretary of State personally before ouster. (And indefinite leave of absence without salary is ouster as is well settled by unanimous case authority.[6]) No pretense is made that any hearing was ever given petitioner, although often demanded. Petitioner is entitled to immediate reinstatement in good and satisfactory standing with full salary from April 17, 1941 onward, because of the violation of his statutory right to a full hearing, pending procedure against him by respondents in substantial com-

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[6] Leave of absence without salary, over objection, is a suspension and in the absence of a special statute suspension *without pay* is a removal from office and is governed by the rules applicable to such removals. *Beuhring* v. *United States,* 45 Ct. Cls. 404; *Boyd* v. *Pendergast,* 57 Cal. App. 504, 207 Pac. 213; *Emmitt* v. *Mayor of New York,* 128 N. Y. 117, 28 N. E. 19; *Egan* v. *Philadelphia,* 113 Pa. Super. Ct. 93, 172 Atl. 183; *Osterhedt* v. *Philadelphia,* 113 Pa. Super. Ct. 8, 171 Atl. 100; *Petersen* v. *Civil Service Board,* 67 Cal. App. 70, 230 Pac. 196; authorities collected in Field, *Civil Service Law* (1939), Ch. IX. See also *Burnap* v. *United States,* 252 U. S. 512, esp. at 520. Our motion to supplement the complaint, attached hereto, appropriately raises all these questions for the consideration of this Court. This (R. 123) also disposes of the "prematurity" argument upon which respondents Berle and Shaw and the lower courts have leaned so heavily.

pliance with statutory requirements. Authorities directly in point on this proposition are:

United States v. *Redgrave*, 116 U. S. 474;
United States v. *Perkins*, 116 U. S. 483;
United States v. *Wickersham*, 201 U. S. 390;
Kalbfus v. *Siddons*, 42 App. D. C. 310.

See also:

Humphrey's Ex'r v. *United States*, 295 U. S. 602;
Myers v. *United States*, 272 U. S. 52, 160-1, 171-4.
Cf. Morgan v. *United States*, 115 F. (2d) 990, *cert. den.* March 17, 1941.

No question of the removal power of the President or the Secretary of State is here involved, however, as the President has never acted in this case and the Secretary has refused to act personally.

The discharges of public officers or employees without fair hearing as required by statute are always avoided by the courts: *Garvey* v. *Lowell*, 199 Mass. 47, 85 N. E. 182; *Matter of Griffin* v. *Thompson*, 202 N. Y. 104, 111, 95 N. E. 7, 9; *Matter of Crowley* v. *Fowler*, 217 App. Div. 16; 215 N. Y. Supp. 690; *Funkhouser* v. *Coffin*, 301 Ill. 257, 133 N. E. 649; *Ingram* v. *Jersey City*, 63 N. J. L. 542, 43 Atl. 445; *McCarthy* v. *Emerson*, 202 Mass. 352, 88 N. E. 668; *Hale* v. *Worstell*, 185 N. Y. 247, 73 N. E. 1177; *Fink* v. *Finegan*, 270 N. Y. 356, 1 N. E. (2d) 462; *Simons* v. *McGuire*, 204 N. Y. 253, 97 N. E. 526.

State cases to the same effect might be multiplied indefinitely but are adequately collected in Field, *Civil Service Law* (1939), chaps. VIII to X, inclusive. Respondents' disregard of the statutory procedure commanded by Congress in petitioner's case is flagrantly illegal and should be so declared.

Here the history of the Foreign Service should be considered. This is briefly adverted to in the opinion of the Court of Appeals (R. 100-102) and in the petition for rehearing (R. 108-110). The Civil Service of the United States had its origin in the Pendleton Act of 1883 (*Myers* v. *United States, supra*), and the idea of the merit system spread gradually in the federal government culminating, so far as the Department of State was concerned, in a series of Executive Orders from 1909 to 1915 blanketing in both diplomatic and consular officers of minor grades. Finally in 1924 came the Rogers Act, consolidating both diplomatic and consular services into one lifetime career service known as the Foreign Service of the United States. Defects in the administration of this Act, mostly fraud and favoritism, in the highest State Department officials, were exposed in a Senate investigation of 1927. See Senate Report 1069 of the 70th Congress, 1st Session. With this report came a recommendation for new safeguards to be written into the Rogers Act, *and the heart of these proposals were Sections 23g, 23h, and 23i. All these sections were newly added in 1931.* These were adopted in 1931 with a conference report (House Report No. 2702 of 1931), which shows conclusively the dominant intent of Congress to protect Foreign Service officers such as the petitioner.

The conference report on Section 23i reads as follows:

> "This section contains a much needed provision establishing an equitable method for the involuntary retirement of unsatisfactory officers upon an appropriate annuity, or a bonus of one year's salary (depending upon the officer's age at retirement). *Adequate provision is made for previous warning concerning unsatisfactory work and for granting a hearing to officers before such involuntary separations.*"

This would seem to be conclusive as to the intent of Congress in the enactment of Section 23i. See for further his-

tory of the Foreign Service, White, *Government Career Service* (1935), pp. 75-76.

Legislation in 1939 only liberalized certain annuity provisions and in no way affects the Act of 1931 on which petitioner relies. Applicable Executive regulations under the Act are set out in full in the Appendix, and merely add to the measure of petitioner's rights so flagrantly violated here.

The position of petitioner on this matter is simple: he is conscious that he is right as *a matter of fact*, and believes that there are ample provisions of law, both statutory and judicial, to assist him. Certainly the remedies he seeks are proper—mandamus,[7] injunction,[8] and declaratory judgment[9]—since they are a direct, not a collateral or personal, attack upon the official action of respondents Berle and Shaw. The complaint is sufficiently definite in its charges in view of the provision of Rule 9 (b) of the Rules of Civil Procedure that: "*Malice, intent, knowledge, and other condition of mind of a person may be averred generally*". (See *Love* v. *Commercial Casualty Ins. Co.*, 26 F. Supp. 481, 482.) The elements of fraud are averred with particularity in the facts stated in the verified complaint and in the mo-

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[7] Rule 81(b) of the Rules of Civil Procedure; *Marbury* v. *Madison*, 1 Cranch 137, 170; *Roberts* v. *United States*, 176 U. S. 221, 229-231; *Work* v. *McAlester, etc., Co.*, 262 U. S. 200, 208-209; *Miguel* v. *McCarl*, 291 U. S. 442, 451-452. See also Field, *op. cit. supra*, at pp. 230-235.

[8] *Utah Fuel Co.* v. *Natl. Bit. Coal Comm.*, 306 U. S. 56; *Shields* v. *Utah R. R. Co.*, 305 U. S. 177; *Truax* v. *Raich*, 239 U. S. 33. *Cf. White* v. *Berry*, 171 U. S. 366, 376, *Sawyer's Case*, 124 U. S. 200, 223, and *Boyd* v. *Nebraska*, 143 U. S. 135.

[9] *Perkins* v. *Elg*, 307 U. S. 325, 349-350; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 277; Rule 57 of the Rules of Civil Procedure, and Note of the Advisory Committee thereto; Hart, *Administrative Law* (1940), at pp. 490-492. See also *O'Callaghan* v. *O'Sullivan* (1925) 1 Ir. R. 90; *E. Edelmann* v. *Triple-A Specialty Co.*, 88 F. (2d) 852, 853 *et seq., cert. den.* 300 U. S. 680; *Erwin Billiards Parlor* v. *Buckner*, 156 Tenn. 278, 300 S. W. 565; Borchard, *Declaratory Judgments* (1934), pp. 349-356, 402-403, 601-603, 609-611, and authorities therein collected.

tion to supplement the same (R. 123), *and are nowhere denied by respondents Berle and Shaw.* To paraphrase Mr. Justice CARDOZO, the conduct of Berle and Shaw is "instinct" with fraud.[10]

Petitioner's position is easy to understand. Berle and Shaw have sought to ruin his reputation with two false and vicious stories, *solely emanating from them.* When shown sworn proof that these stories were untrue, Berle and Shaw abandoned them *without denying them*—and then have sought to force petitioner's resignation or dismissal on other charges, albeit out of caution, this time of a vaguer variety. Thus Berle and Shaw would not only persist in destroying petitioner but would by inference reaffirm the truth of the two scandalous stories already disproved. If this is not fraud, no other name can be found to fit it.

What has been said is sufficient to demonstrate that both as a matter of interpretation of the complaint and as a matter of the construction of the Rules of Civil Procedure the allegations of fraud, malice, intent and conspiracy against respondents Berle and Shaw are well averred. It is settled law that if this conclusion is correct the rule requiring administrative finality does not apply and both equity and declaratory judgment will protect a victim from the successful consummation of such illegal schemes even where they are still in the process of execution by administrative officials. This is well settled law. See *Utah Fuel Company* v. *National Bituminous Coal Commission,* 306 U. S. 56, 59-60; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41, 47; *Truax* v. *Raich,* 239 U. S. 33, 36-39, and authorities there cited. See Notes, 87 U. of Pa. L. Rev. at 475, 609. Respondents in the lower courts laid great stress on *Myers* v. *Bethlehem*

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[10] For general discussion of the purpose, scope, and operation of the Rules of Civil Procedure, see 45 *W. Va. L. Q.* 5 and 38 Col. Law Rev. 1179.

Corporation, supra, but we point out that Mr. Justice BRANDEIS in the opinion of the Court expressly excepted from the rule of "prematurity" the cases where allegations of proposed improper conduct or proposed improper hearing by administrative officials were made:

> "There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; *or that the Corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied"* (303 U. S. at 47).

These allegations are specifically made in this complaint and particularly in paragraphs 17 and 18 thereof (R. 14-18). Reference is made to a note in 27 *G. W. Law Rev.* 892, which reconciles all of the decided cases by this Court on this express basis. See also *Shields* v. *Utah, Idaho R. R. Co.,* 305 U. S. 177, and *A. F. L.* v. *N. L. R. B.,* 103 F. (2d) 933, 936, 70 App. D. C. 62, 65, affirmed 308 U S. 401, 412. On this point the decision of this Court in *N. L. R. B.* v. *Ind. & Mich. Elec. Co.,* decided January 18, 1943, is also pertinent. Hence it follows that the allegations of this complaint are not subject to being stricken for prematurity, and that the action of the lower courts was erroneous in this respect. *Cf. City Bank Farmers' Trust Co.* v. *Schnader,* 291 U. S. 24; *Texas* v. *Florida,* 306 U. S. 398; *Okla. Gas Co.* v. *Russell,* 261 U. S. 290, 293, per *Holmes, J.*

In any event it is perfectly clear that by any accepted test of "prematurity" this action is not *now* premature and has not been since April 17, 1941 when petitioner *over his objection* was stricken from the payroll informally by respondents. See *supra* note 6.

Hence there is no good reason in either fact or law to deny petitioner direct relief against the illegal actions of

respondents Berle and Shaw. Their attempts to hide behind the great names of the President and the Secretary of State deceive no one except themselves. Accordingly the statutes enacted by the Congress with just such a situation as this in mind should here be enforced to the full.

Point II.

The lack of confirmation by the Secretary of State of petitioner's rating as "unsatisfactory" rendered such rating null and void.

The complaint formally charges that the alleged probationary order (Exhibit G to the complaint; R. 64-65) was never confirmed by the Secretary of State as specifically required by Section 23i of Title 22 of the United States Code. See paragraph 15 of the complaint (R. 13), and paragraph 18 (9) (R. 18). Thus it is specifically charged that petitioner's purported rating of *unsatisfactory* "has never been confirmed by the Secretary of State in accordance with the requirements of the said statutes" (R. 13). Furthermore this contention (R. 64-65) is borne out by the form of Exhibit G which contains no recital that the rating of unsatisfactory was ever confirmed by the Secretary of State, shows no evidence on its face or elsewhere that the Secretary of State ever saw this or any similar document, and is signed "For the Secretary of State: G. Howland Shaw." Stated to be based upon "a review of your record" (R. 64), "this instruction" purported to serve as "official notification to you of your unsatisfactory rating" (R. 65), but not of its confirmation by the Secretary. Likewise it is to be noted that the Secretary of State not only has refused to claim this document as his own, but his only utterance herein belies that it is his (R. 69). Authority is scarcely needed to show that such allegations state a good cause of action.

The leading case is, of course, *Morgan* v. *United States*, 304 U. S. 1, where this Court reversed a determination of a specially constituted district court and held that Vice-President Wallace, the then Secretary of Agriculture, had denied appellants a fair hearing in that an Assistant Secretary of Agriculture had heard and weighed the evidence while the Secretary of Agriculture had signed the order. This Court held such action to be an illegality patent on the face of the order rendering it void. See 304 U. S. at 17-22; 304 U. S. 23-26. See also the first *Morgan* case, 298 U. S. 468, 477-479. Here an even stronger case is presented since Section 23i *three times* commands action by the Secretary of State *personally.*

The earlier case of *Runkle* v. *United States*, 122 U. S. 543, is most pertinent. There an order of a court-martial convicting one Major Runkle of embezzlement was required by the applicable statute to be affirmed by the President of the United States. The order purporting to convict and dismiss the said Major Runkle (reported in 122 U. S. at 547) recited that the findings of the court-martial were approved (without saying "by the President") and even contained a statement that "The President is pleased to remit" a certain portion of the court-martial sentence, and were signed by the Secretary of War. On this record in a suit for salary this Court unanimously held the sentence of the court-martial void because it had never been properly confirmed by the President. Not doubting that the President might act through the heads of the executive departments, the opinion of the Court specifically points out that it did not *affirmatively* appear from the dismissal order that the President had approved the sentence as required by statute. See 122 U. S. at 558 *et seq.* Referring to the portion of the order in which the President had exercised clemency in Runkle's case the Court pointed out that this was not the

clear affirmation which statute and Constitution require. See 122 U. S. at 559. In the language of the Court:

> "Under these circumstances, we cannot say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution." * * *
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> "* * * But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not *a mere departmental order* which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only." (122 U. S. at 560, 561.)

The whole contention of petitioner on this point is that the Department of State (*i. e.*, respondents Berle and Shaw) is acting through the medium of a "mere departmental order" when the statute three times requires action by the Secretary of State personally. See Section 23i *infra*, Appendix. This is true both in regard to the probation order and in regard to the summary suspension of petitioner without salary which was in substance and effect an illegal removal from office. See cases and authorities cited *supra*, note 6. That action must be taken personally by the Secretary of State is established both by the *Morgan* case and by the *Runkle* case, and it is on these cases and the plainly applicable analogy of military law that we rely.

Other cases in the analogous field of court martials in the Army and in the Navy showing fatal jurisdictional defects in the composition or conduct of such tribunals, rendering any judgment or order thereof void are: *Ex parte Milligan*, 4 Wall. (U. S.) 2; *Wise* v. *Withers*, 3 Cranch.

(U. S.) 331, 337; *Matter of Brown*, 22 Op. A. G. 137; *Matter of Coleman*, 7 Op. A. G. 436; *Matter of Clark*, 2 Op. A. G. 414. The *Runkle* case was also followed in these cases which hold court martial decisions void for jurisdictional defects; *Anderson* v. *Crawford*, 265 Fed. 504 (C. C. A. 8, 1920); *Van Meheran* v. *Sirmyer*, 36 F. (2d) 876 (C. C. A. 8, 1929). *Accord: Tyler* v. *Pomeroy*, 8 Allen 480 (Mass., 1864). *Cf. Ex parte Garland*, 4 Wall. (U. S.) 333.

The reasoning of this Court in *Runkle's* case above is equally applicable to the present case and the attacked probation order should be set aside or at least examined as to the circumstances surrounding its creation upon a trial on the merits of this complaint. *Runkle's* case was specifically approved and applied by this Court in the later case of *McClaughry* v. *Deming*, 186 U. S. 49, 63 *et seq.*, 67 *et seq.* The proceedings in Hammond's case are defective on their face. See *N. L. R. B.* v. *Cherry Cotton Mills*, 98 F. (2nd) 444; Cf. *N. L. R. B.* v. *Ind. & Mich. Elec. Co.*, decided January 18, 1943. The omission of "confirmed by the Secretary of State" as a recital in the probation order and the omission of any signature by the Secretary of State, as specifically required by Section 23i, render the order fatally defective when it is alleged *on oath* that such order was *in fact* never confirmed by the Secretary of State.

Point III.

The rule of the Court of Appeals that the existence of actual malice in a public officer is immaterial and does not subject such officer to any judicial review is contrary to the established law of this Court and is without precedent anywhere.

The Court of Appeals in affirming the dismissal of petitioner's complaint in the instant case announced the following rule of law: "But, in any event, so long as the inter-

pretation placed by an administrative officer upon the law is a reasonable one, and so long as his conduct is both within the scope of his authority and lacking in the elements of caprice and arbitrariness, his motive is immaterial. In other words, the apparent incongruity of *malicious performance of duty,* assuming that malice actually exists, is not sufficient to deprive the performance of duty of its official character or to subject the officer to judicial interference in either his public or his private capacity'' (R. 102).

This rule is entirely unsupported by any authority or precedent, and is flatly to the contrary of the rules long ago laid down by this Court in *Wilkes* v. *Dinsman,* 7 How. 89, and in *Dinsman* v. *Wilkes,* 12 How. 390. The novel and arbitrary nature of this rule of law was fully called to the attention of the Court of Appeals in our petition for rehearing (R. 114-120), but after seventeen days' delay this was nevertheless overruled without opinion (R. 129). We believe that this rule of law alone warrants the acceptance and reversal of the instant case on certiorari by this Court. We do not believe that even in wartime Americans should be left under the misapprehension that their civil liberties are completely at the mercy of minor administrative officials whose powers (according to the Court of Appeals) are vaster than those of the Federal judiciary. See R. 118.

Our argument on this point is fully set out in our petition for rehearing at R. 114-120, and we shall not burden this Court with a repetition of it here. For the convenience of this Court we shall briefly set forth the facts and law of the *Dinsman* v. *Wilkes* cases, decided here in earlier days.

Under the binding authority of *Wilkes* v. *Dinsman,* 7 Howard 89, and *Dinsman* v. *Wilkes,* 12 Howard 390, the charges of malice against respondents Berle and Shaw (R. 9, 11, 18, 22, 24) state a good cause of action against those respondents. In that case this Court decided that on the question of malice only such a case must go to the jury for

determination. The facts there involved the discipline of a marine by his superior, Captain Wilkes of the Navy, when the ship on which they both served was in the South Pacific. This Court in that case said:

"It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty or any species of oppression, founded on considerations independent of public ends.

"*The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office*" (7 How. at 123). * * *

"Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office however elevated or however humble the victim." (Citation of authorities omitted.) (7 How. at 130.)

"But that the officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty or wilful oppression, or, in the words of Lord Mansfield, in *Wall* v. *McNamara,* that he exercised it as 'if the heart is wrong.' (2 Carr & Payne, 158, *note.*) In short it is not enough to show he committed an error in judgment,

but it must have been a malicious and wilful error. (*Harman* v. *Tappenden et al.*, 1 East, 562, 565, *note.*)" (7 How. at 131.)

On second appeal, this Court unanimously reaffirmed the views expressed above, Chief Justice TANEY speaking as follows:

"But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice, or ill-will, or wantonness of power, without giving him redress in the courts of justice." (12 How. at 403.)

"The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:

"If they believe, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But, if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover." (12 How. at 404-405.)

Or, as the same rule was later stated in a different kind of case, by Mr. Justice HOLMES in a single sentence:

"When such a charge as the present is made, it can be tried fully and fairly only by a court that can hear any and all competent evidence, and that is not bound by findings of the implicated board for which there is any evidence,

always easily produced." (*C. B. & Q. R. R. Co.* v. *Osborne,* 265 U. S. 14, 16.)

See also *Tyler* v. *Pomeroy,* 8 Allen 480 (Mass.), to the same effect.

This rule has never been challenged from ancient days to the present time. The modern rule is well summed up in *Speyer* v. *School District No. 1,* 82 Colo. 534, 538-9, 261 Pac. 858, 860-1, as follows:

"The argument of defendants in support of their demurrer, reduced to its lowest terms, is that no act, otherwise lawful, is made unlawful because done with a bad motive; that the rule in question is lawful, that nothing is alleged against it but motive and so it cannot be enjoined.

"The flaw in this reasoning is in the major premise. It is not universally true. Some acts of public officers became unlawful because of motive, or perhaps more accurately speaking because of purpose.

"Plaintiffs' argument is that any act of a public officer involving discretion, if exercised with malice in bad faith and without a right purpose is unlawful; that the rule in question is a discretionary act and is by the demurrer admitted to have been passed with malice and bad faith, to destroy plaintiffs' business and divert their profits to the pockets of defendants and for no other purpose; that therefore it is unlawful, inequitable and may be enjoined. The argument is sound. Stated in this way, it requires no argument or authority to show that such conduct cannot be sanctioned or permitted. A person may act in his own right from any motive if his act is lawful, but a public officer must act without malice or at least must in good faith pursue a right purpose. The authorities are numerous: *Jones* v. *Cody,* 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160; *Lamb* v. *Redding,* 234 Pa. 481, 83 Atl. 362; *Moore* v. *Porterfield,* 113 Okla. 234, 241 Pac. 346; *Yealy* v. *Fink,* 43 Pa. 212, 82 Am. Dec. 556; *Dinsman* v. *Wilkes,* 12 How. 390, 13 L. Ed. 1036; *Wall* v.

McNamara, cited and quoted in *Johnstone* v. *Sutton*, 1 T. R. 493, 536; *Black* v. *Linn*, 17 S. D. 335, 96 N. W., 697, citing many cases; *State* v. *Thornton*, 136 N. C. 610, 48 S. E. 602; *Kansas City* v. *Hyde*, 196 Mo. 498, 96 S. W. 201; *Fertich* v. *Michener*, 111 Ind. 472, 486, 11 N. E. 605, 60 Am. Rep. 709. See also *Smith* v. *Board*, 10 Colo. 17, 13 Pac. 917.

"*Jones* v. *Cody* holds the action of the school board valid, but notes that no malice is charged. In *Lamb* v. *Redding*, the court said, 'if the facts admit of no other conclusion than that the determination of the board has been influenced by other considerations than the public interests, no matter what these may have been, the law will regard it as an abuse of power, a disregard of duty, and it becomes the duty of the courts to interfere for the protection of the public.' pp. 484, 485. We need not here and now go so far as to approve the proposition *in toto*. In *Dinsman* v. *Wilkes* the U. S. Supreme Court, at page 404, makes the whole case turn on the motive or purpose [11] which actuated the officer in doing what it accords him the right to do. So Lord Mansfield in *Wall* v. *McNamara*."

The facts in the above case were that plaintiffs, owners of restaurants located near schools in the city of Denver, alleged that defendants, the District School Trustees, maliciously and solely to ruin plaintiffs' business, passed a rule that all school children, without special permission from their parents, must eat at the school cafeterias. This complaint was dismissed by the lower court, but the dismissal on demurrer was reversed by the Supreme Court of Colorado speaking as above quoted.

In support of this rule it is to be noted that malice, actual or presumed, always aggravates the damages in any case.

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[11] The distinction between "motive" and "purpose" is not always kept in mind by the courts in their opinions. Wig. Ev. Sects. 117 and elsewhere. (Footnote by the Court.)

See *McCall* v. *McDowell*, 1 Abbott (Fed. Cas.) 212 (C. C. Cal., 1867); *Milligan* v. *Hovey*, 3 Bissell (Fed. Cas.) 13 (C. C. Ind. 1871); *Clark* v. *Kelly*, 101 W. Va. 650, 133 S. E. 369; *Britt* v. *Snodgrass*, 66 Mo. 386, 297-298.

We feel that in the world of chaos of today, this Court should again so declare the law in clear and unmistakable terms.

Conclusion.

Wherefore, we respectfully pray that the petition for a writ of certiorari herein be granted.

Respectfully submitted,

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